Supreme Court, U.S.
FILED

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No.

In The

Supreme Court of the United States

October Term, 1994

JOHN S. SMITH,

Petitioner,

vs.

JAMES FRUIN, ROBERT BIEBEL, STEPHEN KUHN and WILLIAM MURRAY,

Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. Does the First Amendment protect a public employee's speech where the employee speaks out in the non-enforcement of a public health law in which the employee has a personal interest as a citizen and not connected with his employment?

II. Did the United States Court of Appeals for the Seventh Circuit err by expanding the definition of "purely private interest" to include speech by a public employee on a matter of public concern motivated, in part, by personal interest not connected with his employment?

TABLE OF CONTENTS

TABLE OF AUTHORITIES iv

JURISDICTIONAL STATEMENT vii

CONSTITUTIONAL PROVISIONS, AND STATUTES viii

STATEMENT OF THE CASE 1

SUMMARY OF ARGUMENT 5

ARGUMENT 6

I. THE COURT OF APPEALS ERRED IN DENYING FIRST AMENDMENT PROTECTION TO A PUBLIC EMPLOYEE'S SPEECH WHERE THE EMPLOYEE SPEAKS OUT ON THE NONENFORCEMENT OF A PUBLIC HEALTH LAW IN WHICH THE EMPLOYEE HAS AN INTEREST AS A CITIZEN AND NOT IN CONNECTION WITH HIS EMPLOYMENT. 6

II. THE COURT OF APPEALS ERRED BY EXPANDING THE DEFINITION OF "PURELY PRIVATE INTEREST" TO INCLUDE SPEECH BY A PUBLIC EMPLOYEE ON A MATTER OF PUBLIC CONCERN MOTIVATED, IN PART, BY A PERSONAL INTEREST NOT CONNECTED WITH HIS EMPLOYMENT. 11

CONCLUSION 17

APPENDIX

A. Order of the United States Court of Appeals for the Seventh Circuit Dated August 15, 1994 .. 1a

B. Decision of the United State Court of Appeals for the Seventh Circuit Dated June 30, 1994 .... 3a

C. Memorandum Opinion and Order of the United States District Court for the Northern District of Illinois, Eastern Division Dated June 28, 1993 ..... 21a

D. Memorandum Opinion and Order of the United States District Court for the Northern District of Illinois, Eastern Division Dated October 21, 1992 ..... 27a

E. Regulations Involved 32a

F. Chicago Police Department Special Order Dated July 14, 1988 ..... 38a

TABLE OF AUTHORITIES

United States Supreme Court Cases

Connick v. Myers, 461 U.S. 138 (1983) . . 4, 5, 6, 7, 8, 10, 11, 12, 15

Pickering v. Board of Education, 391 U.S. 563 (1988) 4

Rankin v. McPherson, 483 U.S. 378 (1987) 7, 11

Appellate Court Cases

Calloway v. Hafeman, 832 F.2d 414 (7th Cir. 1987) 14

Altman v. Hurst, 734 F.2d 1240 (7th Cir. 1984) 13

Barkoo v. Melby, 901 F.2d 613 (7th Cir. 1990) 12

Belk v. Town of Minocqua, 858 F.2d 1258 (7th Cir. 1988) . 7, 12, 15

Breuer v. Hart, 909 F.2d 1035 (7th Cir. 1990) 15

Colburn v. Trustees of Indiana University, 973 F.2d 581 (7th Cir. 1992) 12

Glass v. Dachel, F.3rd 733 (7th Cir. 1993) 15

Griffin v. Thomas, 929 F.2d 1210 (7th Cir. 1991) 13

Hartman v. The Board of Trustees of Community College District No. 508, Cook County, Illinois, 4 F.3d 465 (7th Cir. 1993) 12

Hesse v. Board of Education of Township High School District No. 211, Cook County, Illinois, 848 F.2d 748 (7th Cir. 1988) 13

Kinsey v. Salado Independent School District, 916 F.2d 273, 278-279 (5th Cir. 1990) 9, 16

Linhart v. Glatfelter, 771 F.2d 1004 (7th Cir. 1985) 13

O'Connor v. Steeves, 994 F.2d 905, 913 (1st Cir. 1993) 8

Phares v. Gustafson, 856 F.2d 1003 (7th Cir. 1988) 13

Rode v. Dellarciprete, 845 F.2d 1195 (3rd Cir. 1988) 16

Smith v. Fruin, 28 F.3d 646, at 651 (7th Cir. 1994) 7, 12, 17

Tau v. Freeh, 27 F.3d 635 (D.C. Cir. 1994) 16

Zaky v. United Veterans Administration, 793 F.2d 832 (7th Cir. 1986) 13

Zamboni v. Stamler, 847 F.2d 73, p. 78 (3rd Cir. 1988) 9, 16

District Court Cases

Smith v. Martin, 819 F.Supp 733, 734 (N.D. Ill. 1992) 9

Statutes and Ordinances

28 U.S.C. sec. 1254 vii

28 U.S.C. sec. 1292 vii

42 U.S.C. sec. 1983 . . . . . viii, 3

Chicago Clean Indoor Air Ordinance 1, 2, 5, 7, 14

JURISDICTIONAL STATEMENT

Petitioner seeks to review the June 30, 1994 decision of the United States Court of Appeals for the Seventh Circuit which granted judgment for the Respondents. The Court of Appeals for the Seventh Circuit had jurisdiction over the appeal pursuant to 28 U.S.C. sec. 1292. Subsequently, the Court of Appeals for the Seventh Circuit denied Petitioner's Petition for Rehearing with a suggestion for a hearing en banc on August 15, 1994. 28 U.S.C. sec. 1254(1) confers this Court with jurisdiction to review the judgment of the Court of Appeals for the Seventh Circuit by Writ of Certiorari.

CONSTITUTIONAL PROVISIONS AND STATUTES

FIRST AMENDMENT

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

42 U.S.C. sec. 1983

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of rights, privileges or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

STATEMENT OF CASE

In 1988, the Chicago City Council passed the Chicago Clean Indoor Air Ordinance ("Ordinance") which, among other things restricted smoking in public buildings and prohibited retaliation against City employees for requesting enforcement of the Ordinance. (Appendix E) Shortly thereafter, the Chicago Police Superintendent issued a department-wide Special Order which tracked the language of the Ordinance. (Appendix F)

Petitioner, JOHN S. SMITH, was a detective assigned to the Chicago Police Department's ("CPD") Area 5 Violent Crimes Section and, for many years before, investigated sex offenses committed against women and children. Petitioner is a non-smoker and an amateur competitive long-distance marathon runner.

Virtually immediately after the passage of the Ordinance and the issuance of the CPD Special Order, Petitioner made repeated requests to JAMES E. FRUIN, his commander and the person in overall charge of detectives at Area 5, to enforce the provisions of the Ordinance and the Special Order by designating no smoking areas in the Area 5 police facility. Petitioner also informed FRUIN that Petitioner did not want to inhale other people's carcinogens in the form of second-hand smoke and that he was particularly sensitive to second-

hand smoke. Petitioner's requests to FRUIN were never accommodated. After almost three years of fruitless efforts on the part of the Petitioner in the form of repeated requests made to FRUIN, Petitioner contacted a senior official in the Department of Health of the City of Chicago, charged with the enforcement of the Ordinance, and related his inability to get the Ordinance enforced in the Area 5 facility as well as his personal frustration of being continually subjected to second-hand smoke while working in the Area 5 facility. Subsequent thereto, Petitioner was directed to contact a senior officer in the police department's Legal Affairs Section which Petitioner did on June 12, 1991. Petitioner informed the senior Legal Affairs officer of Petitioner's inability to get the Ordinance and Special Order enforced and expressed his personal frustration of having to be exposed to second-hand smoke while working in the Area 5 facility.

On June 13, 1991 Petitioner was advised by his immediate supervisor, SERGEANT ROBERT BIEBEL, that he was going to be given a smoke-free environment. Petitioner was given a "surveillance assignment" which Petitioner later learned to be pretextual and which lasted for several weeks until terminated as a result of a newspaper article appearing in the Chicago Tribune on July 4, 1991. Petitioner filed his cause of action in the United States District Court for the

Northern District of Illinois, Eastern Division on July 9, 1991 alleging, among other things, violation of his First Amendment Rights enforced through the federally enacted statute 42 U.S.C. sec. 1983.

Subsequent to the filing of his action in the district court, Petitioner was further retaliated against by being placed on the evening shift for a period of seven months; then on the midnight shift for another seven months even though Petitioner had been assigned to the day shift for many years prior to the filing of the lawsuit. Petitioner was also placed on involuntary medical leave for psychiatric reasons despite the fact that the CPD mental health professional found nothing psychologically wrong with the Petitioner. Petitioner also suffered significantly lower performance ratings, but for twenty years prior to his filing the lawsuit Petitioner enjoyed relatively high performance ratings and had an unblemished record. Upon his return to duty from the involuntary medical leave for psychiatric reasons, Petitioner was placed in an intensely supervised program designed for problem employees.

The Respondents brought a motion for summary judgment in the district court on the basis of qualified immunity alleging that in June of 1991 Petitioner's First Amendment protection regarding free speech as it related to Petitioner's complaints about second-hand smoke in the work place was not clearly defined.

The district court made a preliminary determination, in a Memorandum Opinion and Order dated October 21, 1992, that Petitioner's speech as it related to the inhalation of second-hand smoke is a matter of public concern within the protection of Pickering v. Board of Education, 391 U.S. 563 (1988) and Connick v. Myers, 461 U.S. 138 (1983). (Appendix D) After a full briefing by the parties on the issue of qualified immunity, the district court in a Memorandum Opinion and Order dated June 28, 1993, denied the Respondents motion for summary judgment on the grounds of qualified immunity as to four of the original six defendants. (Appendix C)

The Respondents perfected an appeal to the United States Court of Appeals for the Seventh Circuit. The Court of Appeals reversed the district court's decision holding that Petitioner's speech was not protected by the First Amendment as speech on a matter of public concern; that Petitioner's speech was solely on his own behalf and in his own interest; and Respondents were entitled to judgment on this ground alone and that the district court need not have reached the question of qualified immunity. (Appendix B) Petitioner sought rehearing before the Seventh Circuit with suggestion for rehearing en banc which was denied by order of the Seventh Circuit on August 15, 1994. (Appendix A)

SUMMARY OF ARGUMENT

The Court of Appeals incorrectly applied the threshold test as set down by this Court in Connick v. Myers, 461 U.S. 138 (1983), in determining whether a public employee's speech is a matter of public concern or is it speech of **purely** (emphasis added) private interest. The decision by the Court of Appeals is incorrect as it creates new and larger boundaries for speech which is to be considered purely private interest and, correspondingly, creates new and more restrictive boundaries for speech which touches on matters of public concern. The Court of Appeals thereby reduced the scope of First Amendment protections previously and clearly defined by this Court. The Court of Appeals also shifts the relative importance or weight of the three-pronged Connick test in which an employee's speech must be analyzed as to content, form and context with content being the most important. The Court of Appeals' analysis of Petitioner's speech is incomplete as it only addresses the effects of second-hand smoke which allegedly only involved him personally and therefore held that he was speaking solely on his own behalf and in his own interest in voicing those concerns. The Court of Appeals conveniently ignores Petitioner's demand for the enforcement of the Ordinance or, alternatively, minimizes its import by dismissing it as an after-the-fact self-serving statement. Lastly, the

Court of Appeals overrides the preeminence of the "content" prong of the Connick test by holding that even if the "content" prong can lead one to conclude that the speech is a matter of public concern, the "form" and "context" should be given greater weight if the speaker has a personal interest in the matter about which he spoke.

For all of these reasons, this Court should grant the Petition for Certiorari, reverse the decision of the United States Court of Appeals for the Seventh Circuit and remand to the district court for further proceedings.

I. THE COURT OF APPEALS ERRED IN DENYING FIRST AMENDMENT PROTECTION TO A PUBLIC EMPLOYEE'S SPEECH WHERE THE EMPLOYEE SPEAKS OUT ON THE NONENFORCEMENT OF A PUBLIC HEALTH LAW IN WHICH THE EMPLOYEE HAS AN INTEREST AS A CITIZEN AND NOT IN CONNECTION WITH HIS EMPLOYMENT.

When employee expression cannot be fairly considered as relating to any (emphasis added) matter of political, social, or other concern to the community, government officials should enjoy wide latitude in managing their offices, without intrusive oversight by the judiciary in the name of the First Amendment. Connick, 461 U.S. at 146. This Court continues to zealously guard First Amendment

protections as to any matter of political, social or other concern to the community even if the statement is inappropriate or controversial in character. Rankin v. McPherson, 483 U.S. 378 (1987). The First Amendment does not protect speech and assembly only to the extent that it can be characterized as political. Great secular causes with smaller ones, are guarded. Connick, 461 U.S. at 147. While the Chicago City Council was not a pioneer in enacting public health legislation designed to protect persons from the effects of second-hand smoke, it did follow the lead of numerous jurisdictions at all levels of government when the Ordinance was enacted. The Court of Appeals admitted the public concern nature of the effects of second-hand smoke when it stated that it had no doubt that the issue of second-hand smoke was a matter of widespread public interest in July of 1991 and that it certainly remains the subject of considerable public debate today. Smith v. Fruin, 28 F.3d 646, 651 (7th Cir. 1994) (Appendix B). The Seventh Circuit recognizes that "content" is the greatest single factor in the Connick inquiry. Belk v. Town of Minocqua, 858 F.2d 1258 (7th Cir. 1988). Despite its correct analysis in Belk, that content is the most important factor in the Connick test, the Court of Appeals chose to ignore that precedent and give greater weight to the form and context

of Petitioner's speech and then went on to erroneously analyze the form and context of Petitioner's speech.

The Courts of Appeals have adopted various approaches for determining whether a topic of employee's speech is of "public concern" using the "threshold inquiry" required by Connick, 461 U.S. 138. Some circuits have adopted a content-based analysis, focusing exclusively on which information is needed or appropriate to enable the members of society to make and form decisions about the operation of their government. O'Connor v. Steeves, 994 F.2d 905, 913 (1st Cir. 1993). Other circuits have adopted an analysis which turns either entirely, or in part, on the employee's subjective intent. Id. However, where a public employee speaks out on a topic which is clearly a legitimate matter of inherent concern to the electorate, the court may eschew further inquiry into the employee's motives as revealed by the "form and context" of the expression. Id., at 913-914.

By focusing solely on an employee's motivation as are the Seventh Circuit, a court does not fully analyze the content, form and context of the speech as is required by the three-pronged Connick threshold test. The Fifth Circuit has expressly recognized that an employee's speech may contain a mixture of public and personal concerns and it does not read Connick, 461 U.S. 138, to exclude the

possibility that an issue of private concern to the employee may also be an issue of public concern. Kinsey v. Salado Independent School District, 916 F.2d 273, 278-279 (5th Cir. 1990). It is clear that only a portion of a communication need address a matter of public concern. Id. Likewise, the Third Circuit has held that while a public employee has a personal stake in the speech at issue, the speaker's motivation is merely one factor to be considered, but not necessarily controlling, in assessing the character of the employee's speech. "Complete reliance" on the employee's motivation in speaking is inappropriate. It is unlikely that any employee who lacks a personal interest in the subject that gives rise to the speech in question would file a lawsuit to vindicate his or her First Amendment rights. Zamboni v. Stamler, 847 F.2d 73, 78 (3rd Cir. 1988); see also, Smith v. Martin, 819 F.Supp 733, 734 (N.D. Ill. 1992) (Appendix D).

The continuing debate anchored by the proliferation of public health legislation designed to protect individuals against the deleterious effects of second-hand smoke clearly make the issue of second-hand smoke in the work place not only a matter that may touch on public concern but is, in fact, a matter of public concern. The fact that the Petitioner was concerned about the effects of second-hand smoke on his own health did not override the more important "content" analysis

that the issue is one of public concern as well. There is nothing in the record to show that Petitioner had a solely private motivation as it related to his employment at that time, i.e. to advance his personal career or to defend against some adverse personnel action. Rather, his personal motivation was that of any citizen who would expect compliance with, and enforcement of, a public health law in a police station by the police officers who are primarily charged with the enforcement of all laws.

The Seventh Circuit misapplied the threshold inquiry required by the Connick test and erroneously ruled that a personal interest in an issue of public concern by a public employee speaking on his own behalf is not speech protected by the First Amendment as speech on a matter of public concern.

For the reason set forth above, this Court should grant the Petition for Certiorari, reverse the decision of the Court of Appeals and remand to the district court for further proceedings.

II. THE COURT OF APPEALS ERRED BY EXPANDING THE DEFINITION OF "PURELY PRIVATE INTEREST" TO INCLUDE SPEECH BY A PUBLIC EMPLOYEE ON A MATTER OF PUBLIC CONCERN MOTIVATED, IN PART, BY A PERSONAL INTEREST NOT CONNECTED WITH HIS EMPLOYMENT.

In analyzing and contrasting the difference between matters of public concern and matters only (emphasis added) of personal interest, this Court held in Connick, that when a public employee speaks not as a citizen upon matters of public concern but instead as an employee upon matters only of personal interest, absent the most unusual circumstances, a federal court is not the appropriate forum in which to review the wisdom of a personal decision taken by a public agency allegedly in a reaction to the employee's behavior. 461 U.S. at 147. This Court, in analyzing the statement made by the speaker in expressing a desire to see a more efficient assassination attempt on the President's life if one was to be made in the future, applied the threshold test of its prior decision in Connick and came to the conclusion that it plainly dealt with a matter of public concern despite the fact that it was made in a private conversation and despite the fact that it was inappropriate or controversial in character. Rankin, 483 U.S. at 388.

While Connick, uses the words, "... only of personal interest ..." other courts in applying Connick have used parallel expressions such as "**purely** (emphasis added) private interest", Belk, 858 F.2d at 1262, n5; "**entirely** (emphasis added) personal in nature." Smith, 28 F.3d at 651. In the Seventh Circuit there appears to be well established precedent that when speech was not a matter of public concern but rather that of **purely** (emphasis added) private interest, the **purely** (emphasis added) private interest is generally and inextricably connected to a personnel matter involving the speaker. In Colburn v. Trustees of Indiana University, 973 F.2d 581 (7th Cir. 1992), the overriding reasons for the speech were the concerns of a few individuals whose careers may be on the line and the speech appeared more like an internal personal dispute than an effort to make the public aware of wrongdoing. In Hartman v. The Board of Trustees of Community College District No. 508, Cook County, Illinois, 4 F.3d 465 (7th Cir. 1993), Hartman's speech related predominately to her personal interest in resolving the friction between herself and Glover (another Defendant) and not as part of some broader effort to protest sexual harassment. In Vukadinovich v. Bartels, 853 F.2d 1387 (7th Cir. 1988), the plaintiff was attempting to articulate his private dissatisfaction with his termination and the reasons given for it. In Barkoo v. Melby, 901 F.2d 613 (7th Cir. 1990), the

plaintiff provided no evidence that she was concerned with anything more than advancing her career or, more appropriately here, preventing her career from going downhill. In Yatvin v. Madison Metropolitan School District, 840 F.2d 412 (7th Cir. 1988), the plaintiff wanted to advance her career and not promote a cause. In Zaky v. United Veterans Administration, 793 F.2d 832 (7th Cir. 1986), the plaintiff's statements were made in defense of numerous complaints against the plaintiff and were made in the context of an employee protecting his job in a matter of personal interest. In Hesse v. Board of Education of Township High School District No. 211, Cook County, Illinois, 848 F.2d 748 (7th Cir. 1988), the plaintiff's speech was not voiced out of a concern for the public but rather plaintiff's criticisms merely defended the plaintiff's personal teaching methods. In Griffin v. Thomas, 929 F.2d 1210 (7th Cir. 1991), the plaintiff's speech related directly to her performance rating which was a matter of purely private concern. In Phares v. Gustafson, 856 F.2d 1003 (7th Cir. 1988), the plaintiff's speech related directly to having her position reclassified as a medical records librarian. In Altman v. Hurst, 734 F.2d 1240 (7th Cir. 1984), the plaintiff, in advising a fellow officer to appeal a disciplinary action and becoming subject to retaliatory action for such advice, was not protected by the First Amendment. In Linhart v. Glatfelter, 771 F.2d

1004 (7th Cir. 1985), the plaintiff's speech was only for the purposes of securing his job as chief of police. In Calloway v. Hafeman, 832 F.2d 414 (7th Cir. 1987), plaintiff's remarks were connected to her subsequent demotion by virtue of her reassignment. All of the foregoing decisions of the Seventh Circuit clearly show how the speaker was attempting to advance his or her career or to defend against some type of adverse personnel action by attempting to raise issues purporting to be matters of public concern. An analysis of these decisions clearly shows the specific employment or personnel connection of the speaker and that the speech was uttered and motivated either in response to the adverse personnel action or in anticipation of a contemplated adverse personnel action. Petitioner's speech was to promote a cause, i.e. the enforcement of the public health ordinance and the creation of a smoke-free work environment. Nothing in the record discloses that Petitioner was seeking to advance his career or to prepare a defense against some adverse personnel action when he undertook the speech on the issue of the public and individual health hazards of second-hand smoke and the nonenforcement of the public health ordinance.

Furthermore, not all situations are clear-cut, i.e. either matters of public concern or matters of purely private interest. The Courts of

Appeals have resolved issues regarding mixed statements, i.e. those statements which touch on matters of public concern and have the personal interest of the speaker. For example, the Seventh Circuit in Belk, 858 F.2d 1258, held that the plaintiff's allegations were bound up in a personal dispute with her employer but that the substance of her threats and grievance undeniably relates to matters of concern to the public. In Glass v. Dachel, 2 F.3d 733 (7th Cir. 1993), the Court of Appeals held that while matters of public concern include speech aimed at uncovering wrongdoing or breaches of the public trust, a personal stake in exposing the wrongdoing is not alone sufficient to declare that the speech does not also involve matters of public concern. Motive may be relevant but not dispositive. In Breuer v. Hart, 909 F.2d 1035 (7th Cir. 1990), the Court of Appeals held that motive behind the employee's speech, while relevant to the public concern inquiry, is not dispositive. The finding that the speaker was motivated by a narrow self-interest may, in itself, strongly suggest that his speech involved a private dispute. Yet, such a finding alone cannot disqualify a speaker from protection. Wrongdoing may often be revealed to the proper authority only by those who have some personal stake in exposing wrongdoing. The Seventh Circuit has repeatedly recognized that "content" is the greatest single factor in the Connick inquiry. In

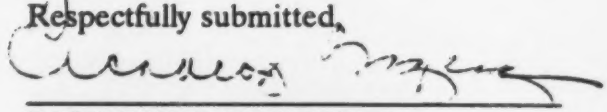
Zamboni, 847 F.2d at 78, all of the expressions of the plaintiff referred to policy issues as well as to his personal complaint. Because of the former, the Third Circuit held as a matter of law that the plaintiff's speech was speech on a matter of public concern. The Fifth Circuit held in Kinsey, 916 F.2d at 279, that although the plaintiff undoubtedly had a personal interest in the outcome of the school board election, his motive is not the controlling issue. In Tao v. Freeh, 27 F.3d 635 (D.C. Cir. 1994), the D.C. Circuit observed that while the speech (communicated in a letter) may have been instigated by an individual personnel dispute, its content reaches beyond that dispute to a broader issue - racial discrimination in a public agency. Id. at 640. The plaintiff's complaint of discrimination, while expressed in connection with her disappointment over not being promoted, was a matter of serious public import that was broader than her individual personnel dispute. Id. at 641. Dismissing plaintiff's speech as unprotected merely because he had a personal stake in the controversy fetters public debate on an important issue because it muzzles an affected public employee from speaking out. Id. at 640 (quoting Rode v. Dellarciprete, 845 F.2d 1195 (3rd Cir. 1988)).

CONCLUSION

It is clear that the Court of Appeals impermissibly and erroneously expanded the definition of "purely private interest." Public employees speaking out on matters of public concern have always had a personal interest or a personal motivation in the subject matter about which they are speaking or advocating. The determination by the Seventh Circuit in Smith, 28 F.3d 646 that the First Amendment is not available to the Petitioner because he had a personal interest in and/or was personally motivated by the issue of second-hand smoke (which the Seventh Circuit acknowledges is a matter of public concern) slams the door on the First Amendment for the Petitioner and all those who would have derived the public health benefits from his speech.

For the reasons set forth above, this Court should grant the Petition for Certiorari, reverse the decision of the Court of Appeals, and remand to the district court for further proceedings.

Respectfully submitted,



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APPENDIX A — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT DATED AUGUST 15, 1994

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
CHICAGO, ILLINOIS 60604

August 15, 1994

Before

Honorable WALTER J. CUMMINGS, Circuit Judge
Honorable MICHAEL S. KANNE, Circuit Judge
Honorable ILANA DIAMOND ROVNER, Circuit Judge

No. 93-2839

JOHN S. SMITH,

Plaintiff-Appellee,

v.

JAMES FRUIN, ROBERT BIEBEL, STEPHEN KUHN, and WILLIAM MURRAY,

Defendants-Appellants.

No. 91 C 4257
Milton I. Shadur, Judge

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division

Appendix A

ORDER

On consideration of the petition for rehearing with suggestion for rehearing en banc filed by plaintiff/appellee on July 13, 1994, no judge in active service has requested a vote thereon, and all of the judges on the original panel have voted to deny the petition. Accordingly,

IT IS HEREBY ORDERED that the petition for rehearing with suggestion for rehearing en banc be, and the same is, hereby DENIED.

APPENDIX B — DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT DATED JUNE 30, 1994

John S. SMITH, Plaintiff-Appellee,

v.

James FRUIN, Robert Biebel, Stephen Kuhn, and William Murray, Defendants-Appellants.

No. 93-2839.

United States Court of Appeals, Seventh Circuit.

Argued Feb. 17, 1994.

Decided June 30, 1994.

Rehearing and Suggestion for Rehearing En Banc Denied Aug. 15, 1994.

* * *

Richard J. Brzeczek, Brzeczek & Associates, Chicago, IL (argued), for plaintiff-appellee.

Lawrence Rosenthal, Deputy Corp. Counsel (argued), Frederick S. Rhine, Asst. Corp. Counsel, Terence J. Moran, Benna R. Solomon, Susan S. Sher, Office of Corp. Counsel, Chicago, IL, for defendants-appellants.

Before CUMMINGS, KANNE, and ROVNER, Circuit Judges.

ILANA DIAMOND ROVNER, Circuit Judge.

John S. Smith, a Chicago police detective, brought suit against his superiors in the police department contending that they had given him a sham surveillance assignment as a punishment for voicing his concerns about smoking in his workplace. The appellants moved for summary judgment on the basis of qualified immunity. The district court denied the motion, reasoning that it should have been clear to the appellants that Detective Smith's complaints constituted protected speech on a matter of public concern, for which he could not be penalized. Because we conclude based on the undisputed facts that Detective Smith's complaints were in the nature of personal grievances rather than speech on a matter of public concern, we reverse.

I. FACTS

At all times relevant to this action, Detective Smith was assigned to the Violent Crimes Section of the Chicago Police Department, Area 5. Commander James Fruin headed the Area 5 Detective Division until his retirement from the police force on July 9, 1991. Robert Biebel and Stephen Kuhn are both sergeants who supervised Detective Smith and other detectives in the Area 5 Violent Crimes Section during the relevant time frame. Sergeant William Murray has supervised case management for detectives assigned to the Violent Crimes Section of Area 5 since 1986.

In 1988, the Chicago City Council enacted the Clean Indoor

Air Ordinance, declaring, "It is the purpose of this section and the policy of the city to provide smoke-free areas in enclosed public places and to regulate smoking in places of employment." Chicago Municipal Code § 7-32-030. The ordinance further provided that "[n]o employer shall . . . in any manner retaliate against any employee . . . because such employee . . . exercises any rights afforded by this section." Chicago Municipal Code § 7-32-060(d). The Superintendent of Police subsequently issued Special Order 88-18, which instructed all employees of the police department to honor and enforce the provisions of the ordinance, directed supervisory personnel to establish smoke-free areas for non-smoking employees, and forbade retaliation against any department employee who exercised his or her rights under the ordinance.

Apparently, smokers at Area 5 headquarters frequently did not honor posted admonitions not to smoke in areas designated smoke-free. This prompted Detective Smith (who describes himself as particularly sensitive to tobacco smoke) to complain to Commander Fruin in January 1991 that the ordinance was not being enforced at Area 5. Detective Smith repeated the objection to Fruin in March, explaining that "I don't want people to quit smoking on my behalf. I just want a place to work where I don't have to smell their smoke." On both occasions, Commander Fruin told Smith that he would see what could be done. By April, however, Detective Smith's concerns had not yet been addressed.[1] He spoke once again to Commander Fruin that month, requesting a work location that was smoke-free and reiterating that he "didn't want to smell smoke anymore." He also

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1. The record does suggest that supervisory personnel were reminded of Special Order No. 88-18 during a staff meeting and admonished that its provisions were to be adhered to strictly.

made similar complaints to Biebel and Kuhn. Detective Smith subsequently explained at his deposition that he had raised the issue with Commander Fruin solely on his own behalf:

Q. When you complained to Fruin about the smoking, did you complain only on your own behalf?

A. I don't speak for anyone else other than myself.

Q. So you were speaking for yourself when you complained to Fruin —

A. That's correct.

Q. — that the smoke bothered you in particular?

A. I don't implicate anyone else, just me. Smith Dep. 48-49.

On April 24, 1991, Smith contacted the City Health Department. Smith apprised Stuart Sikes, an assistant to a Deputy Health Commissioner, that there was "too much smoke for him" at Area 5 Headquarters. Smith called Sikes once again a month later, reporting that "he was still being disturbed by cigarette smoke." In each instance, Smith described the problem only in terms of what he experienced personally; he did not report any incidents involving other nonsmokers nor did he purport to speak on anyone's behalf but his own.

On June 12, 1991, Smith made a similar call to Lieutenant John Klein, Commanding Officer of the police department's Office of Legal Affairs. Again his complaint was framed in personal terms. Klein promptly initiated an inquiry into Smith's concerns, which culminated in the Chief of Detectives contacting Commander Fruin that same day.

Appendix B

On June 13,1991, the day after Smith had contacted Klein, Sergeant Biebel advised Smith of a new assignment: beginning the following day, Smith was to station himself in an unmarked car in the 1500 block of North Austin Avenue from 9:00 a.m. to 5:00 p.m. and record the license plate numbers of all large dark blue, red, and maroon cars driven northbound by African American men. Commander Fruin had conceived of this assignment and approved Biebel's suggestion that it be given to Smith, whose usual purview was the investigation of sex crimes.[2] Smith contends that this assignment was concocted solely to punish him for his speech; the city contends that the assignment was not a sham, but instead was a genuine surveillance assignment initiated in conjunction with the investigation of a large-scale fencing operation taking place in that area. At this juncture of the proceedings, however, we will assume that Detective Smith's take on the assignment is accurate. Smith stationed himself as ordered and copied down license plate numbers for a total of twelve days over a three-week period. (No one else relieved Smith, either at the end of his shift or when he left his post for lunch; nor did anyone take his place on two days when he was absent from work for medical reasons.)

Columnist Mike Royko discussed Smith's plight in the July 4,1991 issue of the Chicago Tribune. Royko quoted Smith as saying "I came to work on June 14, and my sergeant told me that

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2. Although Murray was the case management sergeant in the Violent Crimes Section of Area 5, he claims not to have given Smith any assignment directly. Instead, his practice purportedly was to give assignments to the on-duty sergeant for a particular shift, who would himself assign cases to the detectives. However, Smith contends that Murray, as his watch commander, was directly involved in giving the surveillance assigmment to him. Smith also avers that on one occasion during this assignment, Murray made it a point to drive by Smith's post in order to verify that Smith was on the job.

the commander said that if I wanted a smoke-free environment, I was going to get a smoke-free environment." Mike Royko, *More tax money goes up in smoke,* Chicago Tribune, July 4,1991, at A3. Royko went on to write:

> Those who follow the news probably have noticed that on any given day in Chicago, especially when the weather is hot, people are shooting, stabbing and bopping each other. They are grabbing purses, wallets, rings, chains, watches, emptying cash registers, crawling through open windows, jumping out of gangways, doorways and bushes.
>
> When you toss in the wife-beaters, the saloon brawlers, the flashers and peeping Toms, the drunken drivers, the teenage vandals and the assorted nuts and zanies, there isn't nearly enough police manpower to handle the mayhem and madness.
>
> And here we have a cop with 20 years' experience, 14 as a detective, spending his workday jotting down the license numbers of black motorists who happen to be driving north on Austin Avenue.
>
> Detective Smith has talked to attorney Richard Brzeczek, formerly police superintendent, and they might go into court next week and slap the department with a lawsuit. If they don't, some bungalow owner

> should, on the grounds that this is one hell of a way to spend his real-estate taxes.
>
> In the meantime, I suggest that Police Supt. LeRoy Martin ask Detective Smith's commander to explain the purpose of Detective Smith's goofy assignment.
>
> And if he doesn't get a suitable explanation, Supt. Martin should provide that commander with an environment that is not only smoke-free, but authority-free.

Id. Several days after the article appeared, Smith was removed from the surveillance assignment. Smith was subsequently disciplined for publicly criticizing his commanding officer without first pursuing the matter internally and for revealing to the public the details of an ongoing undercover operation; the propriety of this measure is not at issue here. No one was assigned to replace Smith on Austin Avenue, purportedly because the publicity had compromised the surveillance effort.

Smith brought suit in the district court under 42 U.S.C. § 1983, contending that his superiors had penalized him with the surveillance assignment for his complaints about smoking, in violation of his rights under the First and Fourteenth Amendments. *See Marshall v. Allen*, 984 F.2d 787, 789 n. 1 (7th Cir.1993).[3] At the completion of discovery, the defendants moved

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3. Although the focus of Smith's retaliation charge is on the surveillance assignment, we should note that Smith also asserts that the retaliation continued in a slightly different manner after the surveillance was discontinued. Although Smith (Cont'd)

for summary judgment. In an initial ruling, the district court concluded that Smith's complaints about second-hand smoke qualified as protected speech on a matter of public concern within the ambit of *Pickering v. Board of Education*, 391 U.S. 563, 88 S.Ct. 1731, 20 L.Ed.2d 811 (1968), and *Connick v. Myers*, 461 U.S. 138,103 S.Ct. 1684, 75 L.Ed.2d 708 (1983). *Smith v. Martin*, 819 F.Supp. 733, 734 (N.D.Ill.1992). The court went on to conclude that whether the surveillance assignment was retaliatory or not was a disputed matter that could only be resolved at trial. *Id.*[4] In a second, unpublished opinion, the court rejected the appellants' defense of qualified immunity, reasoning that it was clear in June of 1991 (when Smith was given the assignment) that Smith's complaints amounted to speech on a matter of public concern and consequently that he could not be

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(Cont'd)
had been working during the daytime shift as was his preference, beginning in July 1991 he was placed on the 5 p.m. to 1a.m. shift for seven months without rotation; following that he was reassigned to the midnight shift.

We should also point out that although the nature of the retaliation Smith has alleged may to some seem mild relative to the kinds of retaliation (*e.g.* demotion or discharge) frequently alleged in other cases, the degree of retaliation is immaterial to the issue we address. As we have recognized, even minor forms of retaliation can support a First Amendment claim, for they may have just as much of a chilling effect on speech as more drastic measures. See *Glass v. Dachel*, 2 F.3d 733, 741 (7th Cir.1993).

4. In the same opinion, the district court dismissed a second claim that the defendants had conspired to deprive Smith of his civil rights in violation of 42 U.S.C. § 1985(3). The court found Smith's failure to allege the requisite " 'class-based, invidiously discriminatory animus' " fatal to this claim. *Smith*, 819 F. Supp. at 735 (quoting *Griffin v. Breckenridge*, 403 U.S. 88, 102, 91 S.Ct. 1790, 1798, 29 L.Ed.2d 338 (1971)).

disciplined or penalized for voicing his objections. June 29,1993 Mem.Op. and Order at 3-5, 1993 WL 243159.[5]

The district court's denial of qualified immunity to the appellants is, to the extent it turns on a question of law, a final decision over which we have appellate jurisdiction under 28 U.S.C. § 1291. *Marshall v. Allen*, 984 F.2d 787, 789 (7th Cir.1993) (citing *Mitchell v. Forsyth*, 472 U.S. 511, 530, 105 S.Ct. 2806, 2817, 86 L.Ed.2d 411 (1985)).

II. ANALYSIS

As we explained in *Marshall*, "[t]he defense of qualified immunity shields government officials performing discretionary functions 'from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.' " 984 F.2d at 791 (quoting *Harlow v. Fitzgerald*, 467 U.S. 800, 818, 102 S.Ct. 2727, 2738, 73 L.Ed.2d 396 (1982)). Thus, "[e]ssentially, qualified immunity is a defense 'contingent on the state of the law.' " *Id.* at 792 (quoting *Elliott v. Thomas*, 937 F.2d 338, 341 (7th Cir.1991), *cert. denied*, __ U.S. __, 112 S.Ct. 1242,117 L.Ed.2d 475 (1992)). When the law is settled on a particular point, public employees are expected to conform their

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5. In addition to Fruin, Biebel, Kuhn, and Murray, Smith also named then-Superintendent of Police Leroy Martin and Lieutenant Klein as defendants in his complaint. However, the district court concluded that Martin and Klein were entitled to qualified immunity based on the timing and limited extent of the information they had acquired of Smith's complaints. June 29, 1993 Mem.Op. and Order at 5. Smith has not challenged this ruling on appeal. Our references to the "defendants" are therefore restricted to the four remaining defendants who were denied qualified immunity.

conduct accordingly, and they may be held liable when they do not. On the other hand, they "need not predict [the law's] evolution, need not know that in the fight between broad and narrow readings of a precedent the broad reading will become ascendant." *Greenberg v. Kmetko,* 922 F.2d 382, 385 (7th Cir.1991). Accordingly, "[i]f it were not clearly established that their conduct violated the law at the time the officials allegedly acted, then they are entitled to qualified immunity." *Marshall,* 984 F.2d at 792 (citing *Siegert v. Gilley,* 500 U.S. 226, 231-32, 111 S.Ct. 1789,1793,114 L.Ed.2d 277 (1991)); *Glass v. Dachel,* 2 F.3d 733, 740 (7th Cir. 1993).

The precise question before us, then, is whether in July 1991 it was sufficiently clear that Detective Smith's complaints about smoking in the workplace fell within the protective scope of the First Amendment. That is a question of law that we examine de novo. *Glass,* 2 F.3d at 740. *Marshall,* 984 F.2d at 793. Of course, as this case comes to us at the summary judgment stage, we interpret the record in a light most favorable to Detective Smith, the non-movant. *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 255, 106 S.Ct. 2505, 2513, 91 L.Ed.2d 202 (1986).

What must be made manifestly clear is that not every word a public employee utters is protected by the First Amendment.[6] Rather, as the Supreme Court recently reiterated:

To be protected, the speech must be on a matter of public

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6. When we say "protected," we are speaking only in terms of the public employer's ability to restrain or discipline the employee for the speech in question. Speech that does not address a matter of public concern and which is not protected in that sense may still be entitled to First Amendment protection in other contexts. *See Connick,* 461 U.S. at 147, 103 S.Ct. at 1690.

concern, and the employee's interest in expressing herself on this matter must not be outweighed by any injury the speech could cause to " 'the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees.' " *Connick, supra,* [461 U.S.] at 142 [103 S.Ct. at 1687] (quoting *Pickering v. Board of Ed. of Township High School Dist.,* 391 U.S. 563, 568 [88 S.Ct. 1731, 1735, 20 L.Ed.2d 811] (1968)). It is also agreed that it is the Court's task to apply the *Connick* test to the facts. 461 U.S., at 148, n. 7, and 150, n. 10 [103 S.Ct. at 1690, n. 7, and 1692, n. 10].

Waters v. Churchill, __ U.S. __, __, 114 S.Ct. 1878,1884-85,128 L.Ed.2d 686 (1994).[7] Our analysis in this case is focused on the first prong of the *Connick-Pickering* test, that is, whether Detective Smith's speech addressed "a matter of public concern." *See Gray v. Lacke,* 885 F.2d 399, 410 (7th Cir. 1989); *Vukadinovich v. Bartels,* 853 F.2d 1387, 1390 & n. 5 (7th Cir.1988). We make that determination based on "the content,

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7. We have noted:

> "[T]he purpose of the 'public concern' requirement is to distinguish grievances of an entirely personal character from statements of broader interest concerning one's job, rather than to fix the boundaries of the First Amendment." *Swank v. Smart,* 898 F.2d 1247, 1251 (7th Cir.1990), paraphrasing *Flanagan v. Munger,* 890 F.2d 1557, 1563-65 (10th Cir.1989). The greater the potential social, as distinct from purely private, significance of the employee's speech, the less likely is the employer to be justified in seeking to punish or suppress it.

Eberhardt v. O'Malley, 17 F.3d 1023, 1026 (7th Cir.1994).

form, and context of a given statement as revealed by the whole record." *Connick,* 461 U.S. at 147-48,103 S.Ct. at 1690. Content is the most important of these factors. *Yoggerst v. Hedges,* 739 F.2d 293, 296 (7th Cir. 1984). Yet, as we have emphasized time and again, our inquiry must also take into account "the *point* of the speech in question: was it the employee's point to bring wrongdoing to light? Or to raise other issues of public concern, because they are of public concern? Or was the point to further some purely private interest." *Linhart v. Glatfelter,* 771 F.2d 1004, 1010 (7th Cir.1985); *see also, e.g., Marshall,* 984 F.2d at 795; *Colburn v. Trustees of Indiana Univ.,* 973 F.2d 581, 585-86 (7th Cir.1992); *Barkoo v. Melby,* 901 F.2d 613, 618 (7th Cir.1990); *Gray,* 885 F.2d at 411; *Vukadinovich,* 853 F.2d at 1389-91; *Hesse v. Board of Education of Township High School Dist. No. 211,* 848 F.2d 748, 752 (7th Cir.1988), *cert. denied,* 489 U.S. 1015, 109 S.Ct. 1128,103 L.Ed.2d 190 (1989); *Callaway v. Hafeman,* 832 F.2d 414, 417 (7th Cir.1987); *but see Belk v. Town of Minocqua,* 858 F.2d 1258,1263-64 (7th Cir.1988) (if content of speech is of public concern, employee's personal motivation to speak does not defeat finding that speech is protected).

In this case, the district court thought it beyond dispute that "the inhalation of second-hand smoke is a matter of public concern." 819 F.Supp. at 734; *see also* June 29, 1993 Mem.Op. and Order at 2. As the court pointed out, the City's enactment of the Clean Indoor Air Ordinance three years before Smith began to air his concerns established the public's interest in this subject. *Id.* at 3-4. And because it was clear long before July of 1991 that public employees enjoyed First Amendment protection for speech on matters of public concern, the court reasoned, the defendants could not reasonably have claimed any doubt about the state of the law vis a vis Smith's complaints. *Id.* at 4-5. The error we detect in the district court's reasoning lies in its premise:

that because the *subject* of Detective Smith's complaints was one of public interest generally, his statements about that subject were necessarily speech on a matter of public concern. As we explain below, we find as a matter of law that Smith's speech did not fall into this category. Consequently, we need not proceed further with the qualified immunity analysis; for only if Smith's remarks were speech on a matter of public concern would we have to inquire whether Smith's superiors reasonably should have understood them to be protected.

We have no doubt that the issue of second-hand smoke was a matter of widespread public interest in July of 1991; it certainly remains the subject of considerable public debate today. But the fact that an employee speaks up on a topic that may be deemed one of public import does not automatically render his remarks on that subject protected. *Hartman v. Board of Trustees of Community College District 508*, 4 F.3d 465, 471 (7th Cir.1993). The content and form of the employee's remarks, along with the underlying circumstances, including the employee's reasons for speaking, remain essential to this determination. *See Colburn*, 973 F.2d at 587; *Barkoo*, 901 F.2d at 618-19; *Egger v. Phillips*, 710 F.2d 292, 317 (7th Cir.1983) (en banc).

Our review of the record as a whole convinces us that Smith's complaints were entirely personal in nature. We use the word "personal" in two senses: on his own behalf and in his own interest. As the content of Smith's remarks makes clear, each time he raised the smoking issue, he spoke solely in terms of his own sensitivity to smoke and the difficulty he had experienced with smokers at Area 5 headquarters. He did not cite any difficulties experienced by other non-smokers, nor did he purport to speak on behalf of anyone but himself. *See Colburn*, 973 F.2d at 587. The relief he requested was likewise individual; he simply wanted a

work environment in which he would not be exposed to second-hand smoke. Smith himself summed it up succinctly when asked at his deposition why he had raised the matter with his superiors and with the Health Department: "I'm a non-smoker and I'm a runner, and I don't appreciate having to inhale other people's carcinogens."

Smith also chose to raise his concerns in a largely private setting. *See Colburn,* 973 F.2d at 587-88; *Callaway,* 832 F.2d at 417. With the exception of his complaints to the Health Department, each of his complaints was, so far as the record reveals, made to superiors within the police department on a one-to-one basis. Of course, the fact that the speech in question occurred in the context of private conversations does not necessarily signify that the speech is of private rather than public concern. *Givhan v. Western Line Consolidated School District,* 439 U.S. 410, 415-16, 99 S.Ct. 693, 696-97, 58 L.Ed.2d 619 (1979); *Colburn,* 973 F.2d at 588; *Gray,* 885 F.2d at 411. But given the content of Smith's remarks, the fact that they were made in the context of private conversations with his superiors tends to confirm their personal nature. *See Colburn,* 973 F.2d at 588. His inquiries to the Health Department arguably may have taken on a somewhat more public quality to the extent he sought assistance outside the chain of command within the police department. *See Glass,* 2 F.3d at 741.[8] Again, however, Smith's concerns were voiced solely in personal terms and for personal reasons, confirming that his motivation in speaking was personal. *See Colburn,* 973 F.2d at 586-87; *Barkoo,* 901 F.2d at 619.[9]

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8. Indeed, the city cites Smith's decision to circumvent the hierarchy within the police department as a circumstance that would justify a decision to take adverse action against Smith for his speech. Appellees' Br. at 37.

9. Smith's remarks to the *Chicago Tribune*, of course, were printed in a (Cont'd)

Because Smith's complaints were both motivated by and framed in terms of his own interests, they did not constitute speech on a matter of public concern. The public, we agree, had a significant interest in workplace smoking, as evidenced by the Chicago City Council's effort to guarantee non-smoking workers protection from second-hand smoke. Yet, we cannot say that Smith's remarks were of intrinsically greater concern to the public than complaints concerning sexual harassment (*Gray*, 885 F.2d at 411; *Callaway*, 832 F.2d at 417), public education (*see Vukadinovich*, 853 F.2d at 1390-91; *Hesse*, 848 F.2d at 751-52), the appointment of a new police chief (*Linhart*, 771 F.2d at 1010-11), or the alleged requests of a city official for assistance in procuring sexual favors from other city employees (*see Hartman*, 4 F.3d at 471-72). We have found remarks on each of those topics not to constitute speech on a matter of public concern where, as here, they were made for purely personal reasons rather than a desire to air the merits of the issue. Thus, although the content of some remarks may lift the speech to the level of public concern even if the employee's reasons for speaking out are entirely self-interested, *see Glass*, 2 F.3d at 741; *Belk*, 858 F.2d at 1263-64, we

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highly public forum. *But see Egger*, 710 F.2d at 317 ("the factors which determine whether a story is newsworthy are hardly cotermin[o]us with the factors which determine whether the communication has societal ramifications, and, in any event, newspaper editors cannot decide the question for us"); *Gray*, 885 F.2d at 411. However, Smith does not rely on this speech (and whatever adverse reaction the *Tribune* column itself may have provoked) as a basis for his claim. The focus of Smith's case is instead on his earlier speech and the surveillance assignment that he was allegedly given in retaliation for that speech. After the *Tribune* column appeared, Smith was removed from that assignment. We do note that the record reflects some question as to whether certain subsequent personnel decisions concerning Detective Smith were made in retaliation for his speech and/or his lawsuit. However, those matters are not before us.

do not think that the speech at issue here, focused as it was on the difficulties the speaker himself had experienced as a non-smoker, can be placed in this category. *See Barkoo,* 901 F.2d at 620.

At his deposition, when asked if there was any other reason why he had pursued the smoking issue, Smith did add: "It's the law" and "I'm paid to enforce the law. We're not to break it." This testimony could be read to reflect a concern with the integrity of the police department independent of Smith's own interests as a non-smoker. But given the plainly individual focus of Smith's complaints, this single remark offered after-the-fact in the midst of litigation does not, in our view, transform the character of Smith's speech. *See Limes-Miller v. City of Chicago,* 773 F.Supp. 1130, 1142-43 & n. 17 (N.D.Ill.1991). At the same time, although citizens no doubt have an interest in how their government conducts its business, "[t]o presume that all matters which transpire within a government office are of public concern would mean that virtually every remark — and certainly every criticism directed at a public official — would plant the seed of a constitutional case." *Connick,* 461 U.S. at 149, 103 S.Ct. at 1691. Thus, remarks that are otherwise personal in nature do not take on a public import due simply to the "supposed popular interest in the way public institutions are run." *Ferrara v. Mills,* 781 F.2d 1508, 1516 (11th Cir.1986) (quoted with approval in *Hesse,* 848 F.2d at 752, and *Vukadinovich,* 853 F.2d at 1391); *see also Barkoo,* 901 F.2d at 618.

We agree with the suggestion of Detective Smith's counsel at oral argument that a public employee ought not have to "form an organization" before her remarks will be deemed speech on a matter of public concern. Nor should she be required to call a press conference. *Barkoo,* 901 F.2d at 619. If a public employee speaks as a citizen on a matter of public concern, her speech is

entitled to First Amendment protection whether she speaks as a lone individual or as the representative of many others, and whether she does so discreetly with her co-workers or in a more public fashion. *See Gray*, 885 F.2d at 411 ("the private nature of a statement does not 'vitiate the status of the statement as addressing a matter of public concern' " (quoting *Rankin v. McPherson*, 483 U.S. 378, 386-87 n. 11, 107 S.Ct. 2891, 2898 n. 11, 97 L.Ed.2d 315 (1987)); *Barkoo*, 901 F.2d at 619. And we do not mean to suggest that merely because the employee has a personal interest in the subject of her remarks, they do not constitute speech on a matter of public concern. As we observed in *Colburn*, "[m]any public employees who speak out about conduct within their places of employment have some interest in the institution of change, and this by itself would not prevent their speech from being constitutionally protected." 973 F.2d at 587 (citing *Breuer v. Hart*, 909 F.2d 1035, 1039 (7th Cir.1990)); *see also Glass*, 2 F.3d at 741. But where, as here, the speech and the underlying circumstances on the whole indicate that the employee was speaking as an individual employee pursuing personal interests, we are compelled to conclude as a matter of law that his speech was not protected by the First Amendment as speech on a matter of public concern. *Connick*, 461 U.S. at 147, 103 S.Ct. at 1690.

We must also stress that we do not sit in review of the merits of Smith's complaints or the wisdom of the actions the police department allegedly took in response to those complaints. These are matters beyond our purview, once we have concluded that Smith's remarks did not constitute protected speech. *Connick*, 461 U.S. at 146-47, 103 S.Ct. at 1690. It may be, as the district court suggested, that Smith's superiors conducted themselves in a deplorable fashion. *See* June 29, 1993 Mem.Op. and Order at 1; 819 F.Supp. at 734. If so, Smith's remedies, if any, lie in the

Chicago Clean Indoor Air Ordinance and the internal grievance procedures available to municipal employees.[10] Smith's only claim to federal jurisdiction rests on the First Amendment. Having concluded that Smith's complaints did not constitute speech on a matter of public concern, our intervention is at an end.

III. CONCLUSION

Because Smith spoke solely on his own behalf and in his own interest in voicing his concerns about second-hand smoke within the Chicago Police Department, his speech was not protected by the First Amendment as speech on a matter of public concern. The defendants were therefore entitled to judgment in their favor on this ground; the district court need not have reached the question of qualified immunity.

REVERSED.

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10. We concede that the remedies available under the ordinance are quite minimal. Section 7-32-080(c) allows for fines of only $25 to $100 for violations of the ordinance.

APPENDIX C — MEMORANDUM OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION DATED JUNE 28, 1993

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 91 C 4257

JOHN S. SMITH,

Plaintiff,

v.

LEROY MARTIN, et al.,

Defendants.

MEMORANDUM OPINION AND ORDER

Chicago Police Detective John Smith ("Smith") has been the victim of what for current purposes must be recognized as a truly outrageous type of retaliation for his having spoken out against being forcibly subjected to the inhalation of second-hand smoke in the performance of his official duties. This Court's October 21, 1992 memorandum opinion and order (the "Opinion") made short shrift of the motion filed by defendants (all of whom are fellow members of the Chicago Police Department) for summary judgment — a motion that had been advanced on less than colorable grounds.

Defendants then sought to appeal from that denial on

qualified immunity grounds, even though the opinion had not dealt with that issue at all.[1] That appeal aborted when the Court of Appeals dismissed it on the strength of its opinion in *Gosnell v. City of Troy*, 979 F.2d 1257, 1260-61 (7th Cir. 1992). Now the qualified immunity issue is again before this Court, this time in a fully-briefed posture. This time around it proves successful as to two of the six defendants, but unsuccessful as to the other four.

It may be well to explain at the outset what defendants are plainly *incorrect* in arguing. As amplified a bit later, it borders on the frivolous for defendants to argue that nonsmokers' exposure to second-hand smoke was not, at the time defendants acted in a retaliatory fashion against Smith for complaining in June 1991, "a matter of public concern" within the meaning of *Pickering v. Board of Education*, 391 U.S. 563, 568 (1968) and *Connick v. Myers*, 461 U.S. 138, 146 (1983). And given the long-established place of *Pickering* and *Connick* in the constitutional firmament, there can be no contention that the right of a public employee not to be retaliated against for the exercise of First Amendment rights[2] was not then "clearly established" within the meaning of

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1. Defendants' original memorandum in support of their summary judgment motion had referred only briefly to the subject of qualified immunity — it was the memorandum's final argument, occupying just one page of a 28-plus-page memorandum devoted to a host of other issues. All of the remaining briefing did not really speak to that subject at all, so that the Opinion focused on the issues that the parties had debated at some length. Indeed, the qualified immunity argument in defendants' original memorandum had an entirely different thrust from what is now advanced by defendants as the key element in such a claim.

2. As always, this opinion adheres to the conventional and convenient (though technically imprecise) practice of referring to the relevant underlying Bill of Rights provisions (each of which of course imposes limitations only on the federal government) rather than to the Fourteenth Amendment (which applies to state actors and has been construed to embody such Bill of Rights guaranties).

the definitive qualified immunity decisions in *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982) and *Anderson v. Creighton*, 483 U.S. 635, 640 (1987). Finally, defendants' argument — advanced in their original summary judgment motion but apparently abandoned in their current effort — that Smith cannot recover because he had no property interest in a particular job assignment (defendants' Sept. 4, 1992 Mem. 28) is absurd (indeed, the only case that defendants cited for that proposition, *Altman v. Hurst*, 734 F.2d 1240 (1984), *expressly* confirms the existence of a substantive due process claim for conduct such as that complained of by Smith (*id.* at 1243)).

But those failed contentions do not necessarily prove fatal to defendants' current motion, because qualified immunity is a game in which even one strike is out. What does doom the collective motion by defendants is the fact that it also fails on the only issue that merits more than brief mention: the contention that it was somehow not clear in June 1991 that the point of Smith's speech was to deal with matters of public concern, rather than solely to improve his personal working conditions.

On that score the area of "public concern" was certainly established beyond dispute well before June 1991. Some three years earlier the City of Chicago had enacted its Clean Indoor Air Ordinance that stated in part (Chicago Mun. Code § 7-32-030 (emphasis added)):

> It is the purpose of this section *and the policy of the City* to provide smoke-free areas in enclosed public places and to regulate smoking in places of employment.[3]

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3. [Footnote by this Court] It may be noted parenthetically that earlier this

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That ordinance continued with an equally express provision (*id.* § 7-32-060(d)) on which Smith was entitled to rely:

> No employer shall . . . in any matter retaliate against any employee . . . because such employee . . . exercises any rights afforded by this Section.

That much is not contested by defendants. Instead they urge that Smith invoked the public policy of the ordinance solely in his own personal interest, rather than as a matter of public concern. Two recent decisions from our Court of Appeals provide the total answer to that argument.

First, last fall *Churchill v. Waters*, 977 F.2d 1114, 1128 (7th Cir. 1992) dealt with a comparable qualified immunity attack on a claim that was based (like Smith's) on retaliation for the exercise of First Amendment rights. And the court there rejected an argument predicated on defendants' claimed unawareness at the time of their retaliation that plaintiff's speech related to a matter of public concern (*id.*, citations omitted):

> [I]n 1987 the law was clear that the speech of

(Cont'd)

month the Supreme Court upheld a 42 U.S.C. § 1983 complaint by a prison inmate based on his involuntary exposure to second-hand smoke (*Helling v. McKinney*, 61 U.S.L.W. 4648 (U.S. June 18, 1993)). McKinney's cellmate was a very heavy cigarette smoker, and seven of the nine Justices found that McKinney had stated a claim for relief under the Eighth Amendment's proscription of cruel and unusual punishment. In so doing they affirmed the Court of Appeals' "conclu[sion] that society's attitude had evolved to the point that involuntary exposure to unreasonably dangerous levels of ETS [environmental tobacco smoke] violated current standards of decency" (61 U.S.L.W. at 4649).

> public employees while at work was protected under the First Amendment if it was about matters of public concern in connection with their workplace. Thus, "a reasonable official [sh]ould [have] underst[ood] that what he [was] doing violate[d]" the employee's free speech rights if he fired her for speaking out on a matter of public concern. We believe it is immaterial that the defendants were allegedly unaware of whether Churchill's speech was in regard to a matter of public concern — for while we decline to impose a due process requirement that public officials investigate the precise content of an employee's alleged complaint, we hold that ignorance of the nature of the employee's speech (in particular in light of the record before us) is inadequate to insulate officials from a § 1983 action.

Even more recently, *Marshall v. Allen*, 984 F.2d 787 (7th Cir. 1993) has reviewed the law of qualified immunity in precisely the present context, confirming the viability of Smith's claim against that defense. Too much of the *Marshall* opinion is on point here to justify quoting it at length. What is most critical for current purposes is that neither *Churchill* nor *Marshall* purported to be announcing new doctrine — instead each of those cases relied on well-established law that antedated the June 19, 1991 actions of defendants here.

What has been said up to now saves Smith's claim against all defendants as a group. But for a reason that brings into play a different facet of qualified immunity, Smith cannot keep former

Superintendent of Police Leroy Martin and Lieutenant John Klein in the case. Based (1) on the limited information that each of them had about Smith's grievance and (2) on when it was in the sequence of events that each of them acquired that information, it cannot be said that Smith had a clearly established constitutional right to have either of them do more than he did in response to that information. Accordingly, each of defendants Martin and Klein is dismissed as a defendant on qualified immunity grounds.

Conclusion

In summary, there is no genuine issue of material fact as to defendants Leroy Martin and John Klein, and each of them is entitled to a judgment as a matter of law on qualified immunity grounds. Accordingly each is dismissed as a defendant. But as to the remaining defendants (former Commander of Detectives James Fruin and Police Sergeants Robert Biebel, Stephen Kuhn and William Murray), their motion for summary judgment on qualified immunity grounds is denied. This Court accordingly sets a status hearing for 9 a.m. July 8, 1993 to discuss setting the case for trial.

s/ Milton I. Shadur
Milton I. Shadur
Senior United States District Judge

Date: June 28, 1993

APPENDIX D — MEMORANDUM OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT, N.D. ILLINOIS, E.D. DATED OCTOBER 21, 1992

John S. SMITH,

Plaintiff,

v.

Leroy MARTIN, et al.,

Defendants.

No. 91 C 4257.

United States District Court,
N.D. Illinois, E.D.

Oct. 21, 1992.

* * *

Richard J. Brzeczek, Chicago, IL, for plaintiff.

Kelly R. Welsh and Terence J. Moran, Chicago, IL, for defendants.

MEMORANDUM OPINION & ORDER

SHADUR, Senior District Judge.

Defendants have moved for summary judgment against John Smith ("Smith"), who claims a violation of his constitutional rights because he was allegedly punished for speaking out against the deliberate flouting of the Chicago Clean Indoor Air Ordinance by defendants — fellow members of the Chicago Police Department. Smith has responded to that motion on the three issues that this Court identified for the parties in its September 11,

1992 oral directive. Although each side has necessarily occupied substantial space in addressing the issues,[1] no extended discussion is required to deal with defendants' motion, which is denied.[2]

First Amendment Protection

This Court has had occasion in the past to comment on the remarkable level of serendipity that is associated with the business of federal judging. Once again a current opinion from our Court of Appeals has delivered a timely message applicable to a pending motion — this time it is the thorough treatment in *Churchill v. Waters*, 977 F.2d 1114 (7th Cir. 1992) of the same issues that are posted here.

As to the first and most critical threshold question — whether the inhalation of second-hand smoke is a matter of public concern within the protection of such cases as *Pickering v. Board of Education*, 391 U.S. 563, 568, 574, 88 S. Ct. 1731, 1734-35, 1737-38, 20 L. Ed. 2d 811 (1968) and *Connick v. Myers*, 461 U.S. 138, 142-49, 103 S. Ct. 1684, 1687-91, 75 L. Ed. 2d 708 (1983) — last week's extended opinion in *Churchill* (see especially 977 F.2d at 1120-21) confirms a resounding "yes" answer. And relatedly, the need to draw all reasonable inferences in Smith's favor on defendants' summary judgment motion precludes the

1. Smith is granted leave for the filing of a response in excess of 15 pages in that respect.

2. Defendants' reply memorandum is not due to be filed until November 6. But the nature of summary judgment motions is that if any genuine issue of material (that is, outcome-determinative) fact is identified by the party opposing the motion, nothing that the movant can say by way of reply will make any difference — the motion has to fail.

entry of judgment for defendants as a matter of law under this Court's analysis in *Limes-Miller v. City of Chicago*, 773 F. Supp. 1130, 1141-43 (N.D. Ill. 1991).

Like the plaintiffs in *Churchill* and *Limes-Miller*, Smith's involvement in an issue of public concern did grow out of his own personal interest in the subject. After all, who among us ordinarily gets aggressively involved in issues in which he or she has *no* personal interest? But here the asserted retaliation by defendants took place after Smith had sought to bring the matter onto a larger stage by "going public" with it to the Chicago Department of Health and (at that Department's directive) to the Police Department's Legal Affairs Unit. That reasonably fits the public-concern model that this Court distinguished in *Limes-Miller*. It is of course not essential to that conclusion that the public employee's speech must have taken place in a public forum (see, e.g., *Rankin v. McPherson*, 483 U.S. 378, 388-89, 107 S. Ct. 2891, 2899-2900, 97 L. Ed. 2d 315 (1987)), although the fact of Smith's having gone to the public media after the retaliation might well be taken into account in evaluating the public-concern nature of his grievance at an earlier stage.

Second, defendants' arguments as to the validity of the seemingly outrageous assignment that defendants inflicted on Smith after he had spoken out on the smoking issue (arguments that, if established, would also show the absence of retaliatory motive) cannot survive the granting of the necessary favorable inferences to Smith. No trier of fact is obligated as a matter of law to accept what in surface terms seems a pretextual cover story. On that score this Court, like the factfinder at trial, is not required to accept defendants' testimony about the claimed legitimacy of the investigation and the reason for enlisting Smith in it, given the suspicious timing and the total absence of some internal records that would normally accompany such matters.

Appendix D

Actionable Conspiracy

As with the matters just discussed, the issue of conspiracy vel non is for the trier of fact. Circumstantial evidence — inferences from all of the circumstances, including such a facially bizarre assignment coming hard on the heels of Smith's complaints about the second-hand smoke issue — could reasonably lead to such a determination despite the absence of any express admissions by defendants or any other direct evidence.

But that potential finding of a conspiracy is simply relevant to legal questions that would affect the direct liability of individual defendants under 42 U.S.C. § 1983,[3] for example by bearing on the admissibility of evidentiary matters under Fed. R. Evid. 801(d)(2)(E). Defendants are right in their contention that Smith has not asserted the type of "class-based, invidiously discriminatory animus" that fits Section 1985(3), as definitively cabined by *Griffin v. Breckenridge,* 403 U.S. 88, 102, 91 S. Ct. 1790, 1798, 29 L. Ed. 2d 338 (1971) and its progeny.

Section 1983 Liability

As already indicated, it is basic doctrine that the Section 1983 responsibility of individual defendants must be direct and not vicarious. In those terms, and once again with the required inferences drawn in Smith's favor for summary judgment purposes:

1. Each of defendants James Fruin, Robert Biebel, Steven Kuhn and William Murray

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3. Further citations to Title 42 provisions will simply take the form "Section —."

was directly involved in what must be assumed for present purposes to have been a pretextual and retaliatory assignment in response to Smith's exercise of his First Amendment rights. That is enough to keep those four defendants in the case.

2. Defendant John Klein ("Klein") was apprised of the assertedly retaliatory assignment. If a trier of fact were to find that he turned a blind eye to the matter rather than acting to correct it as Smith had asked, cases such as *Rascon v. Hardiman,* 803 F.2d 269, 276 (7th Cir. 1986) would support a finding of Section 1983 liability on Klein's part as well.

3. If the evidence in Smith's favor is credited (as it must be for the moment), former Superintendent of Police Leroy Martin had a direct involvement akin to Klein's: his having been notified of the unlawful conduct of his subordinates, without then taking appropriate action to correct it as was within his power. Again the principle of *Rascon* and like cases averts summary judgment and leaves the matter to the triers of fact.

Conclusion

Except for the dismissal of Smith's Section 1985(3) claim, material issues of fact preclude the entry of summary judgment in defendants' favor. This action will proceed to trial.

APPENDIX E — REGULATIONS INVOLVED

CHAPTER 7-32
NO-SMOKING REGULATIONS

Article II. Clean Indoor Air Ordinance

§7-32-030. *(192-20.)* **Title and purpose**

This section shall be known and may be cited as the "Clean Indoor Air Ordinance", and shall be liberally construed and applied to promote its purpose and policies. It is the purpose of this section and the policy of the city to provide smoke-free areas in enclosed public places and to regulate smoking in places of employment.

(Added Coun. J. 5-25-88, p.13940, eff. 7-24-88.)

§7-32-040. *(192-20.1.)* **Definitions**

Whenever used in section 7-32-030 through 7-32-090, the following words and phrases shall have the following meanings:

"Bar" means an enclosed area which is devoted to the serving of alcoholic beverages for consumption on the premises and in which the serving of food is only incidental to the consumption of such beverages. Although a restaurant may contain a bar, the term "bar" shall not include the restaurant dining area.

"Dining Area" means any enclosed area containing a counter or tables upon which meals are served.

"Employee" means any person who is employed by any employer in consideration for direct or indirect monetary wages

or profit, and any person who volunteers his or her services for a not-for-profit entity.

"Employer" means any person, partnership, corporation, including a municipal corporation, or non-profit entity who employes the services of one or more persons.

"Enclosed Area" means all space between a floor and ceiling which is surrounded on all sides by walls or windows with appropriate openings for ingress and egress and is not intended to mean areas commonly described as public lobbies and common corridors.

"Place of Employment" means any enclosed area under the control of a public or private employer which employees normally frequent during the course of employment including, but not limited to work areas, employee lounges, cafeterias, restrooms and conference rooms. A private residence is not a "place of employment" unless it is used as a child care or health care facility.

"Public Place" means any enclosed area to which the public is invited. For the purpose of this section, a hospital is a public place.

"Restaurant" means any coffee shop, cafeteria, luncheonette, sandwich shop, private or public school cafeteria or eating establishment, and any other eating establishment, organization, or club which gives or offers for sale food to the public, guests, patrons or employees.

"Service Line" means any indoor line at which one or more persons are waiting for or receiving services of any kind, whether or not such service involves the exchange of money.

"Smoking" means inhaling, exhaling, burning or carrying any lighted cigar, pipe or cigarette.

(Added Coun. J. 5-25-88, p.13941, eff. 7-24-88.)

§7-32-050. *(192-20.2.)* **Smoking in public places**

Smoking shall be prohibited in all public places except in designated smoking areas.

When establishing a designated smoking area, the person establishing such area shall utilize existing physical barriers, ventilation systems, and other physical elements of the premises to minimize the intrusion of smoke into areas where smoking is not permitted.

(a) In all waiting areas of airport terminals, train stations and bus depots, the area where smoking is prohibited must include either (i) a contiguous area of at least 50% of the total seating capacity of the facility or (ii) a separate waiting room for nonsmokers, so long as the room designated for nonsmokers contains at least 50% of the total seating capacity of the waiting area.

(b) Any owner, operator, manager or other person in control of a public place may declare that entire facility as a nonsmoking area.

(c) Smoking is prohibited in all areas of the following public places:

1) Public Restrooms;
2) Polling Places;
3) Service Lines;

4) Public Meeting and Public Assembly Rooms;
5) Taxicabs.

(d) Notwithstanding any other provision of this section, the following areas shall not be subject to the smoking restrictions of this section:

1) Bars;
2) Private residences;
3) Restaurants, hotel and motel conference or meeting rooms and public and private banquet or assembly rooms while these places are being used for private functions.

However, any owner, operator, manager or other person who controls any establishment described in this subsection may designate the entire establishment, or any portion thereof, as a nonsmoking area.

(Added Coun. J. 5-25-88, p.13941, eff. 7-24-88.)

§7-32-060. *(192-20.3.)* **Regulation of smoking in places of employment**

Employers shall provide smoke-free areas for nonsmoking employees within existing facilities to the maximum extent practicable, but employers, owners, operators, managers, or other persons who control the premises are not required to make physical modifications in providing these areas.

(a) Each employee shall be able to designate his or her own work area as nonsmoking area, if such work area is not also a public place, and to post the same with an appropriate sign to be provided by the employer. If, due to the proximity of smokers, size of the work area, poor ventilation or other factors, such

designation does not reduce the effects of smoke to the satisfaction of the employee, the employer shall made additional accommodation by assigning the employees to different but comparable work areas, expanding the size of the work area subject to the prohibition against smoking or implementing other measures reasonably calculated to minimize or eliminate the effects of smoke on the employee.

(b) Every employer shall adopt a smoking policy which shall be communicated to all employees. All employers shall supply a written copy of the smoking policy upon request to any existing or prospective employee. In any dispute arising under the smoking policy, the health concerns of the nonsmoker shall be given priority.

(c) Notwithstanding any other provision of this section, every employer shall have the right to designate any place of employment, or any portion thereof, as a nonsmoking area.

(d) No employer shall discharge, refuse to hire, or in any manner retaliate against any employee or applicant for employment because such employee or applicant exercises any rights afforded by this section.

(Added Coun. J. 5-25-88, p.13942, eff. 7-24-88.)

§7-32-070. *(190-20.4.)* **Signs**

Signs indicating "No Smoking" or "No Smoking-Except in Designated Areas" shall be appropriately posted in all public places. Signs indicating "Smoking Permitted" shall be posted in all designated smoking areas located in places of employment and public places.

(Added Coun. J. 5-25-88, p.13942, eff. 7-24-88.)

§7-32-080. *(192-20.5.)* **Violation and penalties**

(a) It shall be unlawful for any person who owns, operates, or otherwise controls any premises or facility subject to regulation under this ordinance to fail to comply with any of the requirements of sections 7-32-030 through 7-32-070.

(b) It shall be unlawful for any person to smoke in any area designated pursuant to sections 7-32-030 through 7-32-070 as a nonsmoking area.

(c) Any person who violates any provision of section 7-32-030 through 7-32-070 shall be subject to a fine not less than twenty-five dollars ($25) and not more than one hundred dollars ($100).

(d) This section shall not be interpreted or construed to permit smoking where it is otherwise restricted or prohibited by any other applicable ordinance or statute.

(Added Coun. J. 5-25-88, p.13942, eff. 7-24-88.)

§7-32-090. *(192-20.6.)* **Severability**

If any provision, clause, sentence or paragraph of section 7-32-030 through 7-32-080 or application thereof shall be held invalid by a court of competent jurisdiction, such invalidity shall not affect the other provisions of this section which can be given effect without the invalid provision or application, and to this end the provisions of this section are declared to be severable.

(Added Coun. J. 5-25-88, p.13943, eff. 7-24-88.)

APPENDIX F — CHICAGO POLICE DEPARTMENT SPECIAL ORDER DATED JULY 14, 1988

CHICAGO POLICE
DEPARTMENT

SPECIAL ORDER

Date of Issue: 14 July 1988

Effective Date: 15 July 1988

No: 88-18

Subject: CLEAN INDOOR AIR ORDINANCE

Distribution: C

Related Directives: Municipal Code of Chicago, Chapter 192-20 et seq; Department Notice: Ordinances (Enacted and Amended)

I. PURPOSE

This order:

A. provides policy and guidance relative to the application of the Clean Indoor Air Ordinance to enclosed Department facilities.

B. sets forth Department procedures for enforcing the provisions of this Ordinance.

Appendix F

II. POLICY

A. Smoke-free areas for both nonsmoking Department members and the general public will be provided within existing Department facilities to the maximum extent practicable, as required by the Municipal Code of Chicago.

B. When interviews, meetings, etc., are conducted in an area within a Department facility where a "Smoking Permitted" sign is posted AND A NONSMOKING MEMBER(S) IS PRESENT, at the request of the nonsmoking member(s), the area will be designated as a "No Smoking" area throughout the duration of the interview, meeting, etc.

C. The Department will not discharge, refuse to hire, or in any manner retaliate against any member or applicant for employment because such member or applicant exercises any rights afforded by the Clean Indoor Air Ordinance.

D. The health concerns of the nonsmoking person will be given priority in the process of resolving any disputes which may arise as a result of the policy established in this directive.

III. DEPARTMENT FACILITIES

A. The Department has the right to designate any place of employment, or any portion thereof as a nonsmoking area.

B. Smoking is prohibited in the following places:

1. public restrooms.

2. service lines.

3. areas used for polling places.

4. public meeting and public assembly rooms.

5. designated/posted nonsmoking areas.

C. Unit commanding officers/supervisors shall:

1. provide smoke-free areas for nonsmoking members.

2. designate work areas as "Smoking Permitted" or "No Smoking" in a manner intended to minimize or eliminate the effects of smoke on nonsmoking members.

3. ensure that "No Smoking" signs are posted in nonsmoking areas and "Smoking Permitted" signs are posted in smoking areas.

> NOTE: The Acting Chief Operating Engineer of the Property Management Division is charged with the responsibility of posting "No Smoking" signs in those locations where smoking is prohibited as outlined in Item III-B of this directive and with posting other appropriate signs in Department facilities.

D. A Department member shall be able to designate his work area as a nonsmoking area, if such work area is not also a public place, and to post the same with an appropriate sign to be provided by the Department. If due to the proximity of smokers, size of the work area, poor ventilation or other factors, such designation does not reduce the effects of smoke to the satisfaction of the member, the commanding officer/supervisor

shall make additional accommodation by assigning the member to a different but comparable work area, expanding the size of the work area subject to the prohibition against smoking or implementing other measures reasonably calculated to minimize or eliminate the effects of smoke on the member.

IV. ENFORCEMENT PROCEDURES, PUBLIC PLACES

A. When a complaint limited solely to the issue of smoking in a public place is received in the Communication Operations Section, it will not routinely result in the assignment of a field unit. However, if in evaluating the incident the dispatcher determines that the existing work load and available Department resources permit the assignment of a field unit, the appropriate assignment will be made.

B. Whenever a violation of the Clean Indoor Air Ordinance occurring in a public place is brought to the attention of a sworn Department member, the member will exercise persuasion and warning to seek compliance with the Ordinance and resort to the use of an Ordinance Complaint Form or physical arrest only when such measures have failed.

Authenticated by: JJC

LeRoy Martin
Superintendent of Police

88-57 JPC